Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-90

ALFREDO FERNANDEZ "CHINO" "AL" ALFONSO, STEVE GUGGINO, FRANK FRATERRIGO VEGA, LOUIS HENRY "DR.", "BACARDI" FIGUEREDO, SR., SAM VAGLICA AND SAM CASTELLANO, JR.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. _____

ALFONSO, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on May 19, 1975, affirming the judgment of the United States District Court for the Middle District of Florida upon a jury conviction of violations of 18 U.S.C. Secs. 371 and 1955.

OPINION BELOW

The opinion of the United States Court of Appeals affirming the judgment of the District Court is reported at 552 F.2d 605 (5th Cir. 1977). The pertinent part thereof appears in the Appendix, pp A-3 - A-5.

JURISDICTION

This Petition is brought under Rule 19,1. (b), Rules of the Supreme Court of the United States, and 28 U.S.C. 1254 (1), investing this Court with jurisdiction.

QUESTION PRESENTED

The question presented is: whether *28 USC § 753(b)(1)* is mandatory and whether a trial court's refusal to provide the means of a complete transcript of trial proceedings deprives Petitioners of their "right" to Appellate review in a criminal case under the Federal Rules of Appellate Procedure.

STATUTES AND FEDERAL RULES INVOLVED

The provision of *28 USC § 753(b)(1)* is set forth in the Appendix at pp A-9.

STATEMENT OF THE CASE

Petitioners were convicted on June 14, 1975 following a jury trial in the United States District Court for the Middle District of Florida of conspiracy and the operation of an illegal gambling business in violation of *18 USC § 371 and 1955*. Most of the evidence against Petitioners consisted of electronic tapes made from wiretaps of telephone conversations made pursuant to statutory authority. The trial lasted 18 days, and during their deliberations the jury requested a playback of the alleged telephone conversations of two of the Petitioners. The trial court on the theory of keeping the testimony in context permitted, over objection, a playback to the jury of not only the requested taped conversations but a "readback" by the Court Reporter from his stenographic notes all trial proceedings surrounding the original playing of the tapes, which "readback" and "playback" lasted continuously for one and one half days,

which constituted most of the trial proceedings. Near the beginning of this "readback" and "playback" it was noted by trial counsel (based upon daily copy previously furnished by an independent Court Reporter) that there were discrepancies between the trial proceedings as read back by the official Court Reporter and the daily copy, and objections were made as to the accuracy of the readback, which were overruled and the procedure continued. Thereafter, many other objections and motions were made by Defense Counsel on other matters, and rulings by the Court thereon, all in the presence of the jury during the "readback" and "playback" and it was pointed out to the trial court that since the Court Reporter was engaged in reading the testimony that no record was being made of the latter occurrences. Motions were made for a record to be made of such by either another Court Reporter, or a recording device, in accordance with the dictates of 28 USC § 753(b)(1), and denied by the trial court.

Numerous objections and motions were made by counsel for Petitioners during the one and one half days in question. For example, counsel can recall objections, rulings by the trial court, and extensive colloquy between the trial court and counsel over such things as the Court Reporter while reading from his notes to the jury stumbling over words and phrases, omitting parts of testimony, and it is particularly remembered that the government prosecutor in response to counsel's objections deliberately making sarcastic, witty remarks, prejudicial to Petitioners, causing laughter, giggles and snickering from the jury. Motions for Mistrial, arguments in support thereof, and court rulings denying same occurred during this period.

Petitioners Appealed the convictions to the United States Court of Appeals, Fifth Circuit, assigning many errors, including the denial of a complete record for Appellate review. Subsequent to oral argument Petitioners filed with the Court of Appeals Affidavits (Appendix pp A-3, A-5) setting forth as

much as Petitioners and counsel could recall of unrecorded occurrences during the readback by the Court Reporter, and these Affidavits stand uncontradicted. The Court of Appeals affirmed the convictions on May 19, 1977, and on June 15, 1977 denied Petitioner's Petition for Rehearing in banc.

REASONS FOR GRANTING THE WRIT

From the language of the Court of Appeals' discussion of this point it appears that the Court misunderstood what happened in the trial court, but nevertheless, the Court's holding that Petitioners failed to sufficiently demonstrate prejudice in being denied a record for review is not only in conflict with the Fifth Circuit's own prior decisions in *Stephens v. United States* 289 F.2d 308 (5th Cir. 1961), *United States v. Upshaw* 448 F.2d 218 (5th Cir. 71), and *United States v. Selva* 546 F.2d 1173 (5th Cir. 1977), but is in conflict with other circuits, to-wit, *U.S. v. Workcuff* 422 F.2d 700 (USCA, D.C. 1970), *Brown v. United States* 314 F.2d 293 (9th Cir. 1963), *Parrott v. United States* 314 F.2d 46 (10th Cir. 1963) and *United States v. Sigal* 341 F.2d 837 (3rd Cir. 1965), and is in conflict with the United States Supreme Court in *Hardy v. U.S.* 375 U.S. 277, 11 L.Ed. 2d 331.

All circuits, including the Fifth Circuit, hold that 28 USC § 753(b)(1) requiring that all trial proceedings in Federal District Courts be recorded is "mandatory". Some circuits have held that a failure to comply with the statute and a consequent absence of a record for review per se requires a reversal on the theory that it is impossible for an Appellate Court to determine if there was prejudicial error below without a record. The Fifth Circuit, although some of their prior decisions seem to likewise hold, have in other decisions held that the burden is upon an Appellant to demonstrate on Appeal prejudicial error arising from the absence of a record for review. This is in effect the application of the "harmless error rule". The obvious problem with such a principle is that counsel have the burden of trying to

recall trial proceedings, and the appellate court is forced to rely upon recollections of counsel. As the Court stated in *United States v. Sigal*, supra,:

> "the difficulties inflicted upon appellant's counsel by an inadequate transcript of the trial proceedings are necessarily shared by the reviewing court. It is difficult enough in normal circumstances to appraise the propriety of the trial court's various actions on the basis of a cold printed record when that record is replaced by the incomplete hearsay recollections of one of the parties, our review is turned into an exercise in creative imagination. 'It is a cardinal rule of appellate practice that the facts are those found in the record and not those found in the minds of the attorneys' ". *United States v. Sigal* 341 F.2d 837 (3rd Cir. 65) (Chief Judge Biggs concurring and dissenting).

****

> "notwithstanding the problems and delays which will result from remanding this case to the District Court, we are convinced that this is the only acceptable alternative. We have found no cases applying the harmless error rule when the Court Reporter was absent during such a crucial stage of the trial as the instructions to the jury. Moreover, the instruction here challenged was probably accorded particular significance by the members of the jury because they were returned to the courtrooms specifically for the purpose of receiving this additional charge. In this situation we cannot say that no substantial right of the appellant was affected without examining the precise language of the instruction and the circumstances in which it was given. Absence of this information constitutes a fatal defect, and therefore the judgment must be reversed and the cause remanded for further proceedings consistant with this opinion".

This Honorable Court, speaking through Justice Douglas, in *Hardy v. U.S.*, supra, referring to the statute, commonly referred to as the "Court Reporter's Act", stated that the right of Appeal is "illusory" if no transcript is available.

The instant case is not one like the situation in most of the cited cases where only parts of the trial proceedings were omitted, i.e., void dire, summations, etc., but here there is a total lack of a record of court proceedings lasting one and one half days. Moreover, the instant case does not involve an inadvertent absence of a transcript, but a deliberate one, inasmuch as repeated requests were made to the trial court for a record and denied, contrary to the dictates of 28 USC § 753(b)(1).

Petitioners submit that this is a question of paramount importance to the entire judicial system. In addition to conflicts between circuits, which this Court should resolve, as well as the conflict with a prior decision of the Supreme Court of the United States, this Court should define what constitutes the right of Appeal. At this point in our legal system the question of whether or not the law requires a transcript of all proceedings in a trial court remains unanswered. When that question is posed, the first answer would be: it depends upon the Federal Circuit in which one is being tried. The second answer would be that in certain circuits a denial of a transcript means a per se reversal. But, in other circuits, it is incumbent upon an appellant to demonstrate error. That raises the next question, what is the criteria for reversible error on Appeal in the absence of a record? What is the burden upon counsel in a trial to try to create a record when the trial court refuses the means of one, contrary to the mandate of a Federal statute?

For example, Petitioners herein were put in an impossible position at trial. They moved to invoke the mandate of the statute, but the trial court denies it and then in effect tells Petitioners to make their own record for review (which could be accomplished only by the ability of counsel to take shorthand or be gifted with a photographic memory) in order to show prejudice to an Appellate Court. This makes the statute a mockery, the right of an Appeal "illusory", and clearly denies Petitioners due process of law, a fair trial, and the right of judicial review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

EXCERPT FROM FIFTH CIRCUIT OPINION COVERING POINT ON APPEAL

Record of Rereading

[26-28] Appellants also contend that the court erred in failing to make a record of the rereading. 28 U.S.C. § 753(b)(1) requires that a court reporter attend each session of district court and record "all proceedings in criminal cases had in open court". Upon a review of the record we find that the court carefully explained to the jury the procedure to be followed in response to its request for the Trafficante tape. A record was made of numerous objections and motions of counsel outside the presence of the jury, colloquy between court and counsel, and the rulings of the court.

Appellants contend, however, in a "Supplemental Affidavit" and supporting argument filed subsequent to oral argument, that the district court erroneously failed to make a record of the rereading of the evidence, objections, comments of counsel, and court rulings made in open court in the course of the rereading. Specifically the affidavit states that appellants offered a daily copy of the testimony prepared by a state court reporter; that the court sustained the Government's objection to the use of that transcript, and held that only the notes of the official court reporter be read; that there were discrepancies between the notes of the two reporters, and objections were made by counsel for appellants and overruled by the court. While these proceedings are not shown in the transcript of the record, appellants have failed to show they were prejudiced by their omission.[16] In any event, the district court properly relied on the notes of the official court reporter.

It is true, as appellants contend, that the cases are uniform in holding that the requirements of 28 U.S.C. § 753(b) are "mandatory, not permissive". See, *e. g., Calhoun v. United States,* 384 F.2d 180, 183 (5 Cir. 1967). The cases also agree, however, that failure to comply with the statute does not constitute prejudicial error per se. See. *e. g., Strauss v. United States,* 311 F.2d 926 (5 Cir. 1963), *cert. denied,* 373 U.S. 910 83 S.Ct. 1299, 10 L.Ed.2d 412 (1963). Rather, as this court stated in

16. The same is true of the allegations in the supplemental affidavit and argument with respect to the omission of other objections and comments of counsel during the rereading of the testimony.

United States v. Long, 419 F.2d 91, 94 (1969): ". . . in order to require reversal, some specific error or prejudice resulting from failure to record such proceedings must be called to the Court's attention". The rationale behind this requirement was stated by this court in *Addison v. United States*, 317 F.2d 808, 811 (1963): "Obviously even though a failure of the court reporter to report the arguments of counsel were an error per se, such error would not be available to appellants to work a reversal without a showing that it was prejudicial error. Rule 52(a) F.R.Crim. Proc."

Nowhere, either in their briefs or in their Supplementary Affidavit, do appellants specify any prejudice arising from the court's failure to require all of the court proceedings to be recorded. 'This fact alone destroys appellants[']' position, *Addison v. United States, supra* at 811, and distinguishes the present case from those in which this Court has reversed convictions for failure to record proceedings." *United States v. Long, supra* at 94.[17]

Nor do we find any merit in the contention of appellant Vega that the reinstruction of the jury following the rereading of the evidence was confusing or improper.[18]

17. *United States v. Selva*, 546 F.2d 1173 (5 Cir. 1977), cited in appellants' supplemental argument, is distinguishable. There no record was made of counsel's argument, and the case was remanded for a hearing "for the purpose of supplementing the record, if possible, to disclose what transpired during the closing arguments at the trial". We find no basis in the affidavit and argument of appellants' counsel to require this procedure.

18. The court instructed the jury, *inter alia*, that "Count I of the indictment further alleges that the defendants would use these means to carry out their conspiracy". (Emphasis added.) The court then specified the allegations with respect to the participation of each of the appellants without repeating the reference to Count I. The use of the phrase "these means" manifestly refers to the allegations thereafter set forth with respect to the various defendants.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 75-3564

UNITED STATES OF AMERICA
vs.
ALFREDO FERNANDEZ "Chino" "Al" ALFONSO, ET AL.

AFFIDAVIT

BEFORE ME, personally appeared undersigned counsel of record in the above styled cause who being duly sworn, deposes and says

1. On the morning of June 13, 1975, at the trial of this cause, after approximately thirty (30) minutes of the jury's retirement to the jury room, they requested that they rehear the alleged electronically taped, wiretaped conversations of the Defendants, Trafficante and Figueredo.

2. The Court decided that the jury should hear voluminous other taped conversations, and decided that the method to accomplish this was to have the Court Reporter, Rosenfeld, read, presumably verbatum, his stenographic notes of all the trial proceedings, including statements, Motions, and objections of counsel, Court Rulings thereon, etc. At those junctures where a tape recording of a wiretap had been played for the jury then that tape was replayed, using the same F.B.I. agent to operate the tape player as operated it during the trial. At the conclusion of the particular tape the Court Reporter would then resume reading the trial proceedings from his stenographic notes.

3. This procedure was objected to by all counsel, pointing out to the Court that since the trial Court Reporter would be engaged in reading to the jury his notes there would be no record being made of that. Motions were made to have another Court Reporter present, or to employ an electronic recording machine. These Motions were denied by the Court.

4. Attorney Henry Gonzalez had previously at certain stages of the trial employed an Official State Court Reporter to provide him with daily copy, and during the reading of the trial

transcript by the Federal Court Reporter, Rosenfeld, Attorney Gonzalez followed those portions on which he had daily copy, and advises that he found discrepancies between the record as read by the Federal Court Reporter and as transcribed by the State Court Reporter.

5. During the reading of his stenographic notes the Federal Court Reporter, Rosenfeld, on occassion would stumble over, or even omit, certain words or phrases, and at least on one occassion, and we think others, the government prosecutor, Alto, made gratuitous, intentionally witty remarks, causing laughter, giggles and snickering from the jury.

6. Objections were made to such comments, together with a number of other objections, for example to the reading of statements, Motions, objections, arguments of counsel and the Court's ruling thereon which cannot appear of record because no record was made.

7. The reading by the reporter of his stenographic notes and the replaying of the tapes lasted continuously from approximately 10:00 A.M., June 13, 1975, until the evening hours, and resumed Saturday morning June 14, 1975, at approximately 9:30 A.M., until 11:40 A.M.

8. Because of the Trial Court's refusal to provide a record of the foregoing proceedings at a crucial phase of the case, the Defendants and the Appellate Court are deprived of any record to review to determine error or prejudice to the Defendants.

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HENRY GONZALEZ,
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RALPH W. RINEHART,
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ANTHONY F. GONZALEZ,
Attorney for Alfredo Alfonso

EVERETT Q. JONES,
Attorney for Louis Henry
Figueredo, Sr.

Sworn to and Subscribed Before
Me this 24th day of May, 1976.

MY COMMISSION EXPIRES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3564

UNITED STATES OF AMERICA,
Appellee,

vs.

ALFREDO FERNANDEZ "CHINO" "AL" ALFONSO, ET AL,
Appellants.

SUPPLEMENTARY AFFIDAVIT

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned authority, personally appeared HENRY GONZALEZ for the Defendant HENRY TRAFFICANTE; JOHN MATTHEWS for the Defendants SAM VAGLICA and SAM CASTELLANO, JR.; BENNIE LAZZARA and ANTHONY GONZALEZ for the Defendant ALFREDO FERNANDEZ ALPHONSO; RALPH W. RINEHART for the Defendant FRANK FRATTERIGO VEGA; EVERETT W. JONES for the Defendant LOUIS HENRY FIGUEREDO, SR.; and THOMAS H. HANLON, III for the Defendant STEVE GUGGINO, and after being duly sworn, say:

1. That each of us was attorney of record for the separate Defendant in this cause and did represent each of our respective Defendants throughout all of the proceedings from time of indictment through the trial and their respective appeals.

2. That during the course of the Government's argument before the Fifth Circuit Court of Appeals in this cause, (U.S. v. Alfredo Fernandez "Chino" "Al" Alfonso, et al., Case No. 75-3564) Government Counsel alluded to the following statement appearing in Government's brief, Page 54:

". . . Of course other than when the reporter was merely rereading the previously recorded testimony, a recordation was made of all that transpired in open court during the rereading sessions (see, Tr. 1645-1668 . . . . . ."

This statement in the Government's brief and the allegations made by Government Counsel is totally incorrect. The trial court failed to provide a record to include all objections made in open court, arguments of counsel for the Defendants, and Government in open court, colloquy between counsel and the court occurring in open court and rulings of the court, all of which were occurring during the rereading of testimony and listening to tapes.

3. That upon the jury's request for the listening of Trafficante and Figueredo tapes the court convened in open court all parties and counsel for the purpose of determining the procedure to be utilized during the rereading of testimony and listening of tapes as requested by the jury. At that time defense counsel Henry Gonzalez offered to the court daily copy of testimony prepared by an official court reporter for the Thirteenth Judicial Circuit concerning portions that the jury requested reread to them. Government counsel objected demanding that only the notes of the official court reporter Sam Rosenfeld be read. During this time, argument and rulings were made on this point, none of which appear of record because of the failure to provide for a record as requested by counsel pursuant to Title 28 U.S.C. Sec. 753. The trial court allowed over objection the reading back of entire record without excluding objection, arguments, rulings and reason for rulings. These objections do not appear.

4. Immediately after court reporter Rosenfeld commenced to read the trial testimony before the jury in open court, defense counsel noted material discrepancies between what was being read and what was reflected in the daily copy prepared by the official court reporter of the State of Florida. Immediately all counsel made formal objections supported by arguments. Government counsel also argued their positions. There was colloquy between counsel and the court and thereafter court rulings. This continued intermittently during the rereading of the testimony during the entire morning session none of which appears of record because of the failure to provide for a record.

5. Objections were made and arguments were submitted as to inflections by the court reporter, his inaccurate reading of the testimony. The Government responded by argument. There was colloquy between counsel and the court. The rulings of the court, the objections, and arguments do not appear of record.

6. At the commencement of the afternoon session in open court to continue the rereading of the testimony and listening of the tapes by the court reporter to the jury in the manner established by the court defense counsel *again* demanded pursuant to Title 28 U.S.C. Sec. 753 that a recording be made of what was occurring in open court. This particular request was for the first time recorded in a side bar conference as the same appears in the transcript, page 1647, lines 17-22.

7. That Attorney John Matthews objected to the lack of a recording of what was occurring during the reading of the trial testimony in open court before the jury he specifically requested for any type of a recording device of any kind so as to provide a record. (Tr. page 1650). This Motion by Matthews was ignored by the court, the court saying:

(Tr. 1650-1651)

"THE COURT: They are being read—we will handle it like we handle every case in every United States District Court in this country, when a reporter reads his notes back. . . . ."

In connection with the foregoing statement by trial court, see attached affidavit of Dave Pellicer, Deputy Clerk, Middle District of Florida, as Exhibit A.

8. The Court continued to ignore defenses counsel's request to perfect the record on those matters that are the subject of this affidavit, and is evidenced by the final request for a record by Attorney Rinehart. (Tr. 1651) All Efforts on behalf of defense counsel to provide for a record were futile.

9. The comments and opinions of the trial court as to what was not of record (Tr. 1651) is disputed by all trial counsel as appears in this affidavit.

FURTHER AFFIANTS SAYETH NOT.

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SWORN TO AND SUBSCRIBED before me this 31 day of March, 1977.

NOTARY PUBLIC

Notary public state of Florida at large
My commission expires Feb. 23, 1981
Bonded thru general this underwriters

28 USC § 753(b)(1) Reporters

(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.

The number of reporters shall be determined by the Judicial Conference of the United States.

The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augumented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

(d) The Judicial Conference shall prescribe records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerks of the district courts, and may include records showing:

(1) the quantity of transcripts prepared;

(2) the fees charged and the fees collected for transcripts;

(3) any expenses incurred by the reporters in connection with transcripts;

(4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and

(5) such other information as the Judicial Conference may require.

(e) Each reporter shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States at not less than $3,000 nor more than $7,630 per annum. All supplies shall be furnished by the reporter at his own expense.

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any

party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

June 25, 1948, c. 646, 62 Stat. 921; Oct. 31, 1951, c. 655, § 46, 65 Stat. 726; June 28, 1955, c. 189, § 3(c), 69 Stat. 176; June 20, 1958, Pub.L. 85-462, § 3(c), 72 Stat. 207; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; July 1, 1960, Pub.L. 86-568, Title I, § 116(c), 74 Stat. 303; Sept. 2, 1965, Pub.L. 89-163, 79 Stat. 619; Sept. 2, 1965, Pub.L. 89-167, 79 Stat. 647.